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8 UNITED STATES DISTRICT COURT  
9 DISTRICT OF ARIZONA

10 Arizona Department of Economic Security,      }      No. CaseNumber  
an Arizona State agency,                          }  
11    }  
Plaintiff,    }  
12    }  
v.    }  
13 Christine Wormuth; Secretary of the Army,    }  
in her official capacity,                            }  
14    }  
Defendant.    }

**COMPLAINT FOR  
PRELIMINARY INJUNCTION**

17 **INTRODUCTION**

18 1. Plaintiff Arizona Department of Economic Security (“ADES”) brings this  
action for declaratory and injunctive relief against the Secretary of the Army to enjoin her  
20 from replacing ADES as the contractor to operate food services at Fort Huachuca until  
such time as an arbitration panel, convened pursuant to the Randolph-Sheppard Vending  
22 Facility Act, has had the opportunity to render a decision regarding the disputed contract.

23 2. ADES is an agency of the State of Arizona and is the designated State  
Licensing Agency (“SLA”) under the Randolph-Sheppard Act, 20 U.S.C. § 107b. As the  
25 SLA for the State of Arizona, ADES has the responsibility to recruit, train, license, and

1 place individuals who are blind as operators of vending facilities located on federal and  
2 other properties.

3       3. Under the Randolph-Sheppard Act, 20 U.S.C. §§ 107 *et seq.*, and its  
4 implementing regulations, 34 C.F.R. § 395, ADES has a priority for contracts pertaining  
5 to the operation of cafeteria services on federal property in Arizona, including military  
6 food service operations.

7       4. The Arizona Department of Economic Security has held the contract to  
8 provide food services at Fort Huachuca since 2004, and it has done so with its current  
9 blind vendor, Scott Weber, for close to a decade. ADES has consistently received  
10 positive feedback from the Army for its operation of the Fort Huachuca food service  
11 facilities.

12       5. In March 2022, the Army issued a request for proposals for a new contract  
13 to operate the food services at Fort Huachuca (Solicitation W9124J-20-R-0027 (the  
14 “Solicitation”)). The new contract has a five-year ordering period.

15       6. In May 2022, ADES timely submitted a response to the Solicitation.

16       7. As recently as December 2022, the Army deemed that ADES’s  
17 performance “meets contractual requirements,” and stated in its performance evaluations,  
18 that it “would recommend [ADES] for similar requirements in the future.”

19       8. ADES’s proposal in response to the Solicitation, including its proposed  
20 staffing and pricing, was grounded in its experience successfully operating the same  
21 cafeterias covered in the Solicitation.

22       9. The Army misconstrued or misapprehended ADES’s proposal in  
23 fundamental ways, including erroneously concluding that ADES’s proposal did not  
24 include workers to record headcount at the dining facilities when in fact ADES  
25 referenced those workers as “Admin/Cashier” and as “Office Clerk” rather than as the  
26 Army’s preferred title of “Cashier.” Rather than seeking to clarify its misunderstandings,

1 the Army took the drastic step of excluding ADES's proposal from consideration as  
2 "technically unacceptable" without any discussions—much less the meaningful  
3 discussions required under the Randolph-Sheppard Act.

4       10. In excluding ADES's proposal, the Army, acting through the Contracting  
5 Officer assigned to the dining facilities at issue, failed to apply the Randolph-Sheppard  
6 Act's priority.

7       11. On January 20, 2023, the Army issued a pre-award notice letter informing  
8 ADES that its proposed staffing was unacceptable, and that as a result, ADES's bid had  
9 been excluded from the competitive range and ADES would not be considered to  
10 continue to operate food services at Fort Huachuca.

11       12. On January 26, 2023, the Army sent a debriefing letter that outlined what it  
12 erroneously contended were deficiencies with ADES's proposal.

13       13. After a month of communications between counsel for ADES and counsel  
14 for the Army, on March 6, 2023, ADES's Program Administrator sent a letter to the  
15 Army's Contracting Officer explaining the Army's misunderstandings and requesting  
16 that the Army reconsider its exclusion of ADES's from further consideration.

17       14. On April 3, 2023, the Army's Contracting Officer responded to ADES's  
18 request for reconsideration and informed ADES that, after review by the Army  
19 Sustainment Command, which is notorious for its hostility to the Randolph-Sheppard  
20 priority, the Army declined to reconsider its decision.

21       15. On May 30, 2023, ADES filed a request for arbitration with the U.S.  
22 Department of Education pursuant to the Randolph-Sheppard Act, 20 U.S.C. § 107d-1(b).  
23 The arbitration complaint challenged the Army's exclusion of ADES from consideration  
24 for the award.

25       16. ADES's current contract will end on August 31, 2023, and it could be  
26 replaced as early as September 1, 2023. As is common in such cases, ADES requests that

1 the Court maintain the status quo until the arbitration panel has decided whether the  
2 Army correctly applied the Randolph-Sheppard Act and regulations in choosing an  
3 operator at Fort Huachuca.

4       17. With this Complaint, ADES seeks to enjoin the Army from (1) proceeding  
5 with any award under the Solicitation, or (2) if a contract award has been made,  
6 proceeding with contract performance under the newly awarded contract, until the  
7 statutorily mandated arbitration proceeding concludes. ADES will file a Motion for  
8 Preliminary Injunction to accompany this Complaint.

## **JURISDICTION AND VENUE**

10       18. This court has jurisdiction over the subject matter of this action under 28  
11 U.S.C. § 1331 (federal question jurisdiction), 28 U.S.C. § 1346(a)(2) (civil action against  
12 the United States), 28 U.S.C. § 2201 (authorizing declaratory relief), and 28 U.S.C.  
13 § 2202 (authorizing injunctive relief).

14        19.    Venue is proper in this district pursuant to 28 U.S.C. § 1391(e) because a  
15 substantial part of the events giving rise to the claim occurred in this district (at Fort  
16 Huachuca) in Cochise County, Arizona.

## PARTIES

18       20. Plaintiff, the Arizona Department of Economic Security (ADES), is an  
19 agency of the State of Arizona and is the State Licensing Agency (SLA) under the  
20 Randolph-Sheppard Act, 20 U.S.C. § 107b, 34 C.F.R. § 395.5.

21        21. Defendant, Christine Wormuth, in her capacity as the Secretary of the  
22 Army, is the chief executive officer of the United States Department of the Army.

23 | //

24 | //

25 | //

26 | //

## STATEMENT OF FACTS

### *Background*

22. This case arises from the Army's failure to correctly apply the priority and procedures required by the Randolph-Sheppard Act to a contract for the provision of food services at Fort Huachuca.

23. Congress enacted the Randolph-Sheppard Act for the purposes of “providing blind persons with remunerative employment, enlarging the economic opportunities of the blind, and stimulating the blind to greater efforts in striving to make themselves self-supporting.” 20 U.S.C. § 107(a). In furtherance of these goals, Congress mandated that federal agencies give a priority to blind vendors to operate vending facilities on federal property. *Id.* § 107(b).

24. In enacting the 1974 amendments to the Act (the most-recent amendments), Congress described the Randolph-Sheppard program as “one of the most effective employment opportunity programs ever enacted by Congress.” S. Rep. No. 93-937 at 13 (1974)

25. At the same time, Congress recognized the military's longstanding hostility to the Act and its purposes. *See id.* at 10 ("Commanders of military installations are singularly insensitive to the need to develop the program.") (emphasis added).

26. The Department of Education is the federal agency charged with implementing the Act. *See* 20 U.S.C. § 107a(a).

27. The Randolph-Sheppard Act requires that the Secretary of Education prescribe regulations designed to assure that “wherever feasible, one or more vending facilities are established on all Federal property to the extent that any such facility or facilities would not adversely affect the interests of the United States.” *Id.* § 107(b)(2). Further, when authorizing the operation of vending facilities on federal property,

1 agencies must afford “priority. . . to blind persons licensed by a State agency.” *Id.*  
2 § 107(b)(1).

3       28. With respect to cafeterias on federal properties (which include food service  
4 facilities on military bases, *see NISH v. Cohen*, 247 F.3d 197 (4th Cir. 2001); *NISH v.*  
5 *Rumsfeld*, 348 F.3d 1263 (10th Cir. 2003)), the Randolph-Sheppard Act provides:

6           The Secretary [of Education] through the Commissioner [of the  
7 Rehabilitation Services Administration] shall prescribe regulations to  
8 establish a priority for the operation of cafeterias on federal property when  
9 he determines, on an individual basis and after consultation with the head  
of the appropriate installation, that such operation can be provided at a  
reasonable cost with food of high quality comparable to that currently  
provided to employees, whether by contract or otherwise.

10 20 U.S.C. § 107d-3(e).

11       29. The resulting regulations, 34 C.F.R. 395.33 *et seq.*, are referred to herein as  
12 the “Cafeteria Regulations.”

13       30. Promulgated pursuant to that law, the Cafeteria Regulations require that:  
14 Priority in the operation of cafeterias by blind vendors on Federal property  
15 shall be afforded when the Secretary determines, on an individual basis,  
16 and after consultation with the appropriate property managing department,  
agency, or instrumentality, that such operation can be provided at a  
17 reasonable cost, with food of a high quality comparable to that currently  
provided to employees, whether by contract or otherwise. Such operation shall  
be expected to provide maximum employment opportunities to blind  
18 vendors to the greatest extent possible.

19 34 C.F.R. § 395.33(a).

20       31. In each state, a state licensing agency (“SLA”) manages the Randolph-  
21 Sheppard program. 20 U.S.C. § 107b, 34 C.F.R. §§ 395.2-.5. Under the Cafeteria  
22 Regulations, federal agencies enter into contracts with the local SLA to operate cafeterias  
23 on federal properties, and the SLA in turn identifies suitable blind individuals to operate  
24 the vending facilities. 34 C.F.R. § 395.33.

25       32. The Randolph-Sheppard Act also provides a procedure for the resolution of  
26 disputes between an SLA and a federal agency. The SLA submits a request for arbitration

1 to the Secretary of Education; the Secretary then convenes an arbitration panel to hear the  
2 complaint; and the arbitration panel issues a decision that is binding on the federal agency  
3 defendant and is subject to judicial review as a final agency action. 20 U.S.C. §§ 107d–  
4 1(b), 107d–2; 34 C.F.R. § 395.37.

5 ***ADES Services at Fort Huachuca***

6       33. ADES and its licensed blind vendors have successfully provided full food  
7 services at Fort Huachuca for close to 20 years.

8       34. The Army has awarded ADES a series of contracts over the past two  
9 decades, most recently in March 2021. Before then, in March 2016, the Army provided  
10 ADES with a five-year contract to provide full food services at Fort Huachuca.

11       35. ADES’s current blind vendor at Fort Huachuca, Scott Weber, is the  
12 president of Thunder Mountain Enterprises (TME).

13       36. Mr. Weber has over 35 years of food service experience and has served as  
14 the blind vendor operating the Fort Huachuca cafeterias since 2014. In this role, Mr.  
15 Weber and the TME team manage all aspects of the food services operation, including  
16 cooking, providing adequate staffing, menu planning, food storage, and food serving;  
17 conducting and coordinating required trainings; cleaning the dining facilities; submitting  
18 reports to the Army in a timely manner; and ensuring the safety of employees and  
19 soldiers.

20       37. There are three separate cafeterias at Fort Huachuca: Weinstein,  
21 Thunderbird, and Black Tower.

22       38. The Army has consistently rated ADES’s performance at Fort Huachuca  
23 favorably.

24       39. Among other evaluation documents, the Army has completed Contractor  
25 Performance Assessment Reports (CPARs).

1       40. In the most recent rating period, the Army found that ADES “meets  
 2 contractual requirements,” adding that there “are no schedule issues with serving the  
 3 breakfast, lunch, dinner and 4th meal requirements at the applicable DFACs [dining  
 4 facilities].” The evaluation added, “[t]he Contractor continuously meets the schedule of  
 5 last minute meal requests with little to no turn around time.” ADES received a score of  
 6 96% on the quality-of-life report conducted in October 2022.

7       41. The recent CPAR also stated that ADES “stays within the total estimated  
 8 cost.”

9       42. In the same CPAR, dated December 15, 2022, the Army’s evaluator wrote:  
 10 “Given what I know today about the contractor’s ability to perform in accordance with  
 11 this contract or order’s most significant requirements, I would recommend them for  
 12 similar requirements in the future.”

13 ***The 2022 RFP and the Army’s Erroneous Decision to Exclude ADES***

14       43. In March 2022, the Army issued a Solicitation for a new five-year contract  
 15 to provide food services at the Fort Huachuca cafeterias.

16       44. The Solicitation states that “[t]his procurement will be conducted to  
 17 pursuant to the Randolph-Sheppard Act (R-SA), 20 U.S.C. [§] 107 [] Operation of  
 18 Vending Facilities and 34 CFR § 395.33 Operation of Cafeterias by Blind which  
 19 establishes priority for blind persons recognized and represented by the State Licensing  
 20 Agency (SLA), in the award of contracts for the operation of cafeterias on federal  
 21 facilities.”

22       45. The Solicitation identified three criteria by which proposals would be  
 23 evaluated: (1) technical capability, (2) past performance, and (3) price. The technical  
 24 capability factor consisted of two subfactors: (i) key personnel and qualification and (ii)  
 25 staffing plan.

26       46. In May 2022, ADES timely responded to the Solicitation.

1       47. ADES's staffing proposal was based on its extensive experience operating  
2 the cafeterias at issue, and it included adequate staffing for that operation. As ADES  
3 explained in its submission, “[w]e were able to determine the staffing needs of each  
4 DFAC based on our ongoing knowledge of the facility layout and size, meal requirement  
5 and anticipated headcount.”

6       48. By letter dated January 20, 2023, the Army notified ADES that the Army  
7 had completed its initial evaluation of proposals received in response to the Solicitation  
8 and had excluded ADES from further consideration after finding ADES's proposal to be  
9 technically unacceptable. The Army rated ADES as acceptable for subfactor 1 (key  
10 personnel and qualification) but rated ADES as unacceptable for subfactor 2 (staffing  
11 plan). The Army rated ADES's past performance as acceptable.

12       49. In its January 20th letter, the Army wrote, “you are hereby notified that  
13 ADES will receive no further consideration for award and any revision(s) to your  
14 Proposal will not be accepted.”

15       50. Prior to excluding ADES's proposal, the Army did not contact ADES to  
16 discuss the supposed “deficiencies” in that proposal.

17       51. On January 26, 2023, the Army provided limited additional information in  
18 a debriefing letter, which outlined what it contended were deficiencies with ADES's  
19 proposal, focusing primarily on a mistaken contention that ADES's proposal lacked  
20 sufficient cashiers at the dining facilities.

21       52. Over the next month, counsel for ADES communicated with counsel for the  
22 Army to request that the Army reconsider its exclusion of ADES from further  
23 consideration for the Fort Huachuca contract.

24       53. On March 6, 2023, ADES Program Administrator Kristen Mackey sent a  
25 letter to Michael J. Vicory, the Army contracting officer responsible for the Fort  
26 Huachuca Solicitation, requesting that the Army reconsider its exclusion of ADES's

1 proposal from further consideration. In that letter, ADES pointed out the Army's errors in  
 2 evaluating ADES's proposal.

3       54. Contracting Officer Vicory referred ADES's request for reconsideration to  
 4 the Army Sustainment Command, which is known for its hostility to the Randolph-  
 5 Sheppard priority.

6       55. On April 3, 2023, Mr. Vicory responded to Ms. Mackey's letter. In his  
 7 letter, Mr. Vicory wrote that the "hours are ample for managing the headcount [the job  
 8 performed by the cashiers] and admin functions for the total hours for the day"—i.e., he  
 9 appears to acknowledge that the Army had misunderstood ADES's initial proposal.

10      56. However, through Mr. Vicory's letter, the Army (belatedly) claimed to  
 11 have concerns about the security of a \$25 "change fund" for which the "Admin/Cashier"  
 12 employees have responsibility. This post-hoc, pretextual rationale lacks any merit given  
 13 that ADES has operated the cafeterias, including the cash registers, at Fort Huachuca for  
 14 almost twenty years without incident; the Army's attempt to nit-pick ADES's proposal on  
 15 a non-issue reflects its hostility to the Randolph-Sheppard priority; and the Army's  
 16 alleged concern could easily be addressed through meaningful discussions.

17 ***The Army's Violations of the Randolph-Sheppard Act***

18      57. The Army's decision to exclude ADES from consideration for the Fort  
 19 Huachuca food services contract violated the Randolph-Sheppard Act and its regulations  
 20 in at least four respects: (1) the Army improperly evaluated ADES's bid to be technically  
 21 unacceptable and relied on that conclusion to exclude it from the competitive range, (2)  
 22 even if the Army had properly deemed ADES's bid to be technically unacceptable, the  
 23 Army still violated the Act because any supposed "deficiencies" could have been  
 24 remedied by meaningful discussions, (3) the Army failed to consult with the Secretary of  
 25 Education, and (4) the Army failed to apply and follow the stated evaluation criteria in  
 26 the Solicitation.

**The Army improperly judged ADES's proposal to be technically unacceptable.**

2        58. The Army should not have judged ADES's proposal to be technically  
3 unacceptable.

4       59. As reflected in its debriefing letter, the Army excluded ADES's proposal  
5 because the Army contended that the proposal did not include enough staffing.

6       60. The Army's main criticism was that ADES "significantly understaffed" or  
7 "grossly understaffed" the "Cashier" position (i.e., the employees responsible for  
8 recording the headcount of soldiers who are entering the dining halls) by as much as  
9 "101%" [sic].

10        61. In other words, the Army contended that ADES did not include *any*  
11 staffing for the Cashier position.

12 ||| 62. The Army misapprehended ADES's proposal.

13       63. ADES included ample staffing for the Cashier position—doing so under the  
14 titles “Admin/Cashier” in the written technical proposal and “Office Clerk” in the  
15 Staffing Matrix. In the technical proposal document, ADES listed the Admin/Cashier’s  
16 core responsibility as being to “[r]ecord headcount,” adding that “soldier headcounts  
17 should be recorded quickly and in an orderly manner upon entry.”

18       64. The Army's debriefing letter also included two minor gripes with ADES's  
19 staffing proposal that similarly resulted from the Army's misapprehension of the proposal  
20 (which would have been clarified through discussions) and further ignored that—  
21 according to the Army—ADES has successfully staffed the same cafeterias at issue for  
22 the last two decades.

23       65. The Army complained that ADES's proposal for Food Sanitation Specialist  
24 (FSS) and Dining Facility Attendant (DFA) positions were "somewhat understaffed," by  
25 "1-21%."

1       66. Minor differences between ADES’s proposed staffing and the Army’s  
2 estimate, however, are not a sufficient basis to exclude ADES’s proposal altogether. If  
3 that were true, then no bidder, other than one who predicted the Army’s exact staffing  
4 estimates, could ever qualify for a contract.

5       67. The Army’s claim that the DFA and FFS positions were understaffed is  
6 also belied by the fact that ADES based its staffing proposal on its actual experience  
7 running the Fort Huachuca cafeterias, during which the Army has consistently found  
8 ADES’s staffing to be appropriate.

9       68. The Army’s evaluation also ignored that, as explained in ADES’s proposal,  
10 “DFAs and FSSs are cross utilized to help each other with cleaning and serving tasks.” In  
11 other words, ADES equipped some of its employees “with the skills and knowledge  
12 necessary to perform their assigned tasks and [those of] others,” thereby creating staffing  
13 efficiencies, and as a result, cost savings for the Army.

14       69. The only other claimed deficiency asserted in the Army’s debriefing letter  
15 was that ADES did not include staffing for two hypothetical scenarios at the Thunderbird  
16 cafeteria. On this issue, the Army has conceded that those two scenarios do *not occur* at  
17 Fort Huachuca, and it ignored that ADES *did* include pricing for those two scenarios in  
18 the Pricing Matrix submitted with its proposal.

19       70. ADES has operated the contract for close to two decades, during which  
20 time the Army has repeatedly confirmed that ADES provides appropriate levels of  
21 staffing.

22       71. The Army should not have deemed ADES’s proposal to be technically  
23 unacceptable, and thus its exclusion of ADES from the competitive range violated the  
24 Randolph-Sheppard Act and its regulations.

25  
26

1     **The Army excluded ADES's bid from the competitive range even though any minor  
2       "deficiencies" could have been remedied by meaningful discussions.**

3       72. Even if the Army were correct in determining ADES's bid to be technically  
4       unacceptable (which ADES disputes), the Army still erred by excluding ADES from the  
5       competitive range.

6       73. As used in the Cafeteria Regulations, the term "competitive range" has the  
7       meaning it had when the regulations were adopted in 1977. At that time, the term  
8       "competitive range" meant that any proposal "must be considered to be within a  
9       competitive range so as to require negotiations unless it is so technically inferior or out of  
10      line with regard to price that meaningful discussions are precluded." *To the Sec'y of the*  
11      *Air Force*, 48 Comp. Gen. 314, 317 (Nov. 13, 1968).

12      74. In 1988, the Department of Education (DOE) issued a handbook titled  
13      "Administration of the Randolph-Sheppard Vending Program by Federal Property  
14      Managing Agencies."

15      75. The purpose of the DOE's Randolph-Sheppard handbook is to "[e]xplain in  
16       sufficient detail the requirements of the legislation and implementing regulations as they  
17       relate directly to the Federal property managing agencies."

18      76. Chapter VII of DOE's handbook, which pertains to the "Operation of  
19      Cafeterias," provides:

20      Considering the clear intent of the [Randolph-Sheppard] Act, the  
21      determining factor for judging whether a proposal [of the SLA] should be  
22      within the competitive range is if the offer *can be made acceptable by*  
*conducting meaningful discussions . . .* A proposal *must* be considered  
23      within the competitive range unless it is technically inferior or contains  
24      unduly high prices . . . that the possibility of being made acceptable through  
25      meaningful negotiations is precluded.

26      (Emphasis added.)

27      77. The Army violated this requirement.

1       78. The alleged “deficiencies” in ADES’s bid could easily have been made  
 2 acceptable through meaningful discussions.

3       79. The Army failed to conduct any discussions with ADES about its proposed  
 4 staffing, let alone meaningful discussions.

5       80. Nor did the Army consider whether ADES’s proposal could have been  
 6 made acceptable through meaningful discussions.

7       81. At locations throughout the country, the Army has frequently  
 8 communicated with SLA (and/or other bidders) to clarify their proposals. For example,  
 9 with regard to the solicitation for food services at Fort Lee, Virginia, in September 2021,  
 10 the Army sent “Evaluation Notices” to multiple bidders identifying what it believed to be  
 11 the deficiencies in their proposals and asking the bidders an opportunity to clarify or  
 12 correct their respective proposals.

13       82. The Army did not issue an Evaluation Notice to ADES or otherwise give  
 14 ADES any opportunity to clarify or correct its proposal before excluding ADES’s  
 15 proposal from the competitive range.

16       83. Had the Army initiated meaningful discussions (as required), its alleged  
 17 issues regarding ADES’s bid would have been resolved. Had the Army communicated its  
 18 desire for less staffing for certain positions at certain times, for example, ADES would  
 19 have obliged.

20       84. Because ADES’s proposal could readily have been made acceptable to the  
 21 Army through meaningful discussions, the Army violated the Randolph-Sheppard Act by  
 22 excluding that proposal from the competitive range.

23       **The Army failed to consult with the Secretary of Education as required.**

24       85. Congress delegated to the Secretary of Education the authority to grant or  
 25 withhold the priority to be afforded to blind vendors.

26       86. The cafeteria regulation provides that that:

(a) *Priority in the operation of cafeterias by blind vendors* on federal property shall be afforded when the Secretary determines, on an individual basis, and after consultation with the appropriate property managing department, agency or instrumentality, that such operation can be provided at a reasonable cost, with food of a high quality comparable to that currently provided employees, whether by contract or otherwise.

34 C.F.R. § 395.33(a) (emphasis added).

87. Despite this requirement, the Army entirely failed to involve the Secretary of Education in this decision.

88. Had it done so, the Secretary would have concluded that ADES and its licensed blind vendor could provide “food of high quality comparable to that currently provided employees” and that it can provide that operation at a reasonable cost (as the Army cannot dispute, given that ADES is the incumbent operator).

**The Army improperly evaluated the other bidders' proposals.**

89. The cafeteria regulations provide that “solicitations for offers shall establish criteria under which all responses will be judged.” 34 C.F.R. § 395.33(b).

90. The criteria stated in the Solicitation consisted of technical capability, past performance, and price.

91. The Army did not consistently apply these criteria to all the proposals received in response to the Solicitation.

92. For instance, the Army did not consistently apply the technical capability criteria to the other proposals. It faulted ADES's proposal for being "somewhat understaffed" by 1 to 20% for DFA and FFS positions, but it did not apply that same level of scrutiny to the other proposals. Had it done so, the Army would have excluded other bidders as "technically unacceptable" because, on information and belief, those bids included proposed staffing that deviated from the Army's estimates by between 1 to 21%.

1       93. The Army should have also excluded bidders for including *too much*  
 2 staffing, i.e., staffing that was unnecessary to adequately meet the requirements of the  
 3 contract. By deeming proposals that included more staffing than what ADES proposed  
 4 (which was grounded in its extensive experience and the Army has repeatedly recognized  
 5 as appropriate) to be “acceptable,” the Army failed to properly apply the technical  
 6 capability criteria.

7       94. The Army thus evaluated the other proposals incorrectly and in a manner  
 8 inconsistent with the Solicitation and the Randolph-Sheppard Act and regulations.

9 ***Status of Fort Huachuca food services contract and procedural posture.***

10      95. The Army has notified ADES that its operation of the full food services  
 11 contract at Fort Huachuca will end as early as September 1, 2023. Therefore, time is of  
 12 the essence.

13      96. The Army confirmed in its letter of April 3, 2023, that it would maintain its  
 14 decision of excluding ADES from consideration.

15      97. On May 30, 2023, ADES timely submitted a Request for Arbitration to the  
 16 Secretary of Education, thereby initiating the process outlined in the Randolph-Sheppard  
 17 Act. *See* 20 U.S.C. §§ 107d-1, 107d-2.

18      98. Because ADES will lose a major contract that provides substantial financial  
 19 support to a program that benefits numerous blind vendors in Arizona, because ADES’s  
 20 blind vendor will lose his livelihood, and because sovereign immunity most likely  
 21 precludes damages against the Army, ADES and its blind vendor will be irreparably  
 22 harmed unless their removal is enjoined pending the outcome of the arbitration.

23      99. Pursuant to the Federal Rules of Civil Procedure, Defendant has 60 days to  
 24 respond to this Complaint. Fed. R. Civ. P. 12(a)(2). Because ADES will lose its contract  
 25 as soon as September 1, 2023, when performance of the new contract in dispute will have  
 26

1 begun, preliminary injunctive relief is appropriate prior to an Answer being filed. Fed. R.  
2 Civ. P 65 allows for this pre-judgment injunctive relief.

3       100. It is not necessary for Defendant to file an Answer or otherwise appear  
4 before injunctive relief may be granted. The only requirement is that Defendant be given  
5 notice of the request for injunctive relief, notice of the hearing, and an opportunity to be  
6 heard.

## COUNT I

### **(The Army's Actions are Contrary to Law and Fail to Observe Procedure Required by Law, in Violation of the Administrative Procedure Act)**

10           101. ADES repeats and incorporates by reference all allegations of fact set forth  
11 above.

12        102. The Administrative Procedure Act (“APA”), 5 U.S.C. § 702, allows  
13 persons suffering a legal wrong or adversely affected or aggrieved because of agency  
14 action to seek judicial relief.

15        103. By failing to properly evaluate the bids submitted, including that of ADES,  
16 and by failing to include ADES's bid in the "competitive range," the Army has violated  
17 the Randolph-Sheppard Act and its regulations, acted in a manner not in accordance with  
18 law, and failed to observe procedure required by law.

19       104. By failing to consult with the Secretary of Education prior to eliminating  
20 ADES from consideration for award of the Fort Huachuca food services contract, as  
21 required by 20 U.S.C. § 107d-3(e) and 34 C.F.R. § 395.33(a), the Army has failed to  
22 observe procedure required by law, exceeded statutory limitations, and acted in a manner  
23 not in accordance with law.

24        105. ADES's complaints regarding the Army's award of the Fort Huachuca  
25 dining services contract are reviewable by an arbitration panel convened by the Secretary  
26 of Education under 20 U.S.C. § 107d-1(b).

1       106. The arbitration panel's decision will be a final agency action that is  
2 reviewable by this Court. 20 U.S.C. § 107d-2(a) (referencing 5 U.S.C. Chapter 7).

3       107. The APA authorizes injunctive relief to hold unlawful and set aside acts by  
4 federal agencies that are arbitrary, capricious, or contrary to law; that exceed statutory  
5 authority or limitations; or that fail to observe procedure required by law. 5 U.S.C.  
6 §§ 702, 706(2).

7       108. The APA further authorizes injunctive relief pending review, and  
8 specifically authorizes a court to which a case may be taken on appeal (as this case may  
9 be taken to this court on appeal from the decision of the arbitration panel) to take action  
10 to postpone the effective date of the agency action or to preserve status or rights pending  
11 conclusion of the review proceedings. 5 U.S.C. § 705.

## COUNT II

## **(The Army's Actions are Contrary to the Randolph-Sheppard Act)**

14           109. ADES repeats and incorporates by reference all allegations of fact set forth  
15 above.

16        110. The Randolph-Sheppard Act and its implementing regulations, 34 C.F.R.  
17 § 395.33, create a priority for blind vendors to operate food service facilities at federal  
18 properties.

19       111. In addition, the Randolph-Sheppard Act and regulations delineate how  
20 federal property owners are to apply that priority when awarding contracts for the  
21 operation of cafeterias on federal properties.

22        112. By failing to properly evaluate the bids submitted, including that of ADES,  
23 the Army violated the terms of the Randolph-Sheppard Act and its regulations. 20 U.S.C.  
24 § 107d-3(e); 34 C.F.R. § 395.33(a).

25        113. In addition, by failing to consult with the Secretary of Education prior to  
26 eliminating ADES from consideration for award of the full food services contract at Fort

1 Huachuca, the Army has further violated the Randolph-Sheppard Act and its regulations.  
2 20 U.S.C. § 107d-3(e); 34 C.F.R. § 395.33(a), (b).

3       114. Under the Randolph-Sheppard Act, ADES is required to have its  
4 complaints regarding the Army's failure to comply with the provisions of the Act and its  
5 regulations heard and decided by an arbitration panel convened by the Secretary of  
6 Education pursuant to 20 U.S.C. §§ 107d-1(b) and 107d-2.

7        115. By letter to the Secretary of Education dated May 30, 2023, ADES has  
8 requested that such an arbitration panel be convened.

9       116. This Court has jurisdiction over an appeal from that panel's decision (the  
10 "final agency action"). 20 U.S.C. § 107d-2(a). It also has jurisdiction to ensure that such  
11 an appeal is not futile by entering a preliminary injunction if ADES meets the standard  
12 for one.

13        117. Pursuant to 5 U.S.C. §§ 702 and 705, ADES requests that the Court enter a  
14 preliminary injunction until an arbitration panel convened pursuant to the Randolph-  
15 Sheppard Act renders a decision on the substance of ADES's claims against the Army for  
16 its violations of the Randolph-Sheppard Act and regulations and any appeal of that  
17 arbitration decision is concluded.

## PRAYER FOR RELIEF

19 WHEREFORE, Plaintiff Arizona Department of Economic Security requests that  
20 the Court:

21       1. Set a hearing on its request for a preliminary injunction as soon as  
22 practicable, with instructions that counsel for Plaintiff immediately provide notice of the  
23 hearing to Defendant so the Army and its attorney may be present at the hearing;

24        2. Enjoin the Secretary of the Army from replacing ADES as the operator of  
25 food services at Fort Huachuca until after the conclusion of the pending Randolph-  
26 Sheppard arbitration proceeding and any appeal thereof;

3. Enter a judgment (including injunctive relief) compelling any agency action unlawfully withheld, pursuant to 5 U.S.C. § 706(1);

3       4. Enter a judgment (including injunctive relief) setting aside any agency  
4 action that is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance  
5 with the law, pursuant to 5 U.S.C. § 706(2); and

6 | 5. Order any and all other relief this Court deems appropriate.

7 DATED this 2<sup>nd</sup> day of June, 2023.

## HINSHAW & CULBERTSON LLP

/s/ Randy J. Aoyama  
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